MEMORANDUM

In the course of preliminary proceedings, the hearing itself and post-hearing proposed findings of fact, conclusions of law, orders, briefs, and exceptions submitted by the parties, several important legal issues were raised. Some of these matters were addressed in preliminary orders, rulings made at the time of the hearing, and by the Board adopting its Final Order disposing of issues raised by the exceptions. Certain issues remain that are best addressed by a memorandum in support of the Final Order. This memorandum is issued as the basis for various rulings made in the course of the proceeding.

1. Due Process

Throughout this proceeding various objectors have contended that the contested case hearing violated due process.

a. Procedural Due Process

These parties first contend that the water reservation procedure did not afford objectors procedural due process of law. More specifically, they assert that the water reservation procedure gave them insufficient time in which to exercise their right to be heard. (E.g., Brief in Support of Motion to Dismiss on Due Process Grounds, Upper Big Hole Objectors, pp. 2 and 3.)

Water reservation applications, if granted, establish water rights. The decision-making process on water reservation

applications falls under the provisions of the Montana Administrative Procedure Act (MAPA). Mont. Code Ann. § 2-4-601 et seq. (1991), and procedural due process must be afforded all parties. Essential elements of procedural due process are reasonable notice and opportunity to be heard. Mont. Code Ann. § 2-4-601 (1991). Furthermore, contested case hearing procedures must be appropriate to the nature of the case and participants must be provided opportunity to be heard at a meaningful time and in a meaningful manner. Montana State University v. Ransier, 167 Mont. 149, 154 (1975).

For this contested case, the procedure is set out by statute. Mont. Code Ann. § 85-2-316(3)(1991) (requiring that the notice and hearing procedures for water right permits, Mont. Code Ann. §§ 85-2-307 through 309, be followed except where specifically set forth.) Specific provisions for notice require:

a. that notice be mailed to water right holders in the area potentially affected by the proposed appropriation, and

b. that notice be published in a newspaper of general circulation in the area.

The notice must include facts pertinent to the application and state that parties have an opportunity to object and request a hearing. Mont. Code Ann. § 85-2-307(1)(a)(b)(1991).

The Board approved the Notice in this matter and the DNRC sent the Notice, dated July 19, 1991, by first class mail to 11,000 water right holders in the Missouri River basin above Fort Peck Dam. The Notice was also published in eleven newspapers of

general circulation in the basin on July 31, 1991. This Notice was very complete and reasonably calculated under the circumstances to appraise interested parties of the pending action and afford them an opportunity to present their objections. Byrd v. Columbia Falls Lions Club, 183 Mont. 330, 332 (1979).

The Notice provided 30 days for parties to file an objection. 514 objections were received. The hearing started February 3, 1992 and closed on February 28, 1992.

The affected objectors argue that the six-month period between the issuance of the Notice and the contested case hearing was so insufficient as to deny them their "day in Court" and violated their procedural due process rights. (Brief in Support, pp. 1-3.) The Montana Supreme Court has set out some factors to be considered in reviewing whether procedural due process has been provided to a party.

> Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by whom the Constitution entrusted with the unfolding of the process. * * * The precise nature of the interest that has been adversely affected, the manner in which it was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of, and good accomplished - these are some of the considerations that must enter into the judgment.

Montana Power Company v. Public Service Commission, 206 Mont. 359, 367-368 (1983)(summary agency ruling without

hearing)(quoting, Anti-Fascist Committee v. McGrath, 341 U.S. 123, 163 (1951).

The affected objectors state that if more time were available, they would have produced factual evidence of streamflows, fish population, etc. (Brief in Support, p. 5). The objectors have failed to show specifically what information would be presented if more time were allowed, or the time frame necessary to gather such information. The objectors have failed to identify the precise nature of the interests that would be adversely affected, or how this information is relevant to those interests. (See, supra, p. 23.)

The contested case hearing was carried out in a fair and consistent manner with the full rights of a trial type procedure. MSU v. Ransier, at 155. A pre-hearing conference was held on September 19, 1991 and the schedule for the hearing was established and other pre-hearing procedures set out. (ORDER, Oct. 2, 1991.) Objectors filed a Motion for Extension of Time for pre-filing testimony. In denying that Motion, the Hearing Examiner concluded that the parties had not shown that any prejudice would result from the deadline to file written testimony. The Hearing Examiner also ruled that if any prejudice were shown, that party would be allowed to file additional testimony. Some additional testimony was received and introduced without objection. (E.g., Whitetail Water Users Exh. No 5.) No request to offer any additional testimony after the deadline was denied.

Objectors also claimed that due process was denied because the Final EIS was not available until early January 1992. (Brief in Support, pp. 3-4.) The Draft EIS was issued in July 1991 and the public review and comment required by law was complete in September, 1991. Mont. Code Ann. § 75-1-101, et seq. (1991); ARM 36.2.532; ARM 36.16.113(3). The Hearing Examiner provided the parties with an opportunity to amend their testimony or present additional evidence based on any changes or additional information that was contained in the Final EIS that was not found in the Draft EIS. No request was made.

Additionally, objectors state that other documents were not available to them. (Brief in Support, p. 4.) No discovery requests to obtain other documents were filed.

There were substantial reasons for setting up the procedure followed. Procedures used fit the nature of this case, which involved many applicants with a variety of proposed uses, may objectors who objected to various applications, and a very large geographical area. Pre-filed testimony was required for the purposes of expediting the hearing, for the convenience of the parties, and to reduce the need for discovery. This procedure allowed parties to fully participate while keeping the costs of participating down and allowing all facts to be considered within a reasonable amount of time. All objectors were specifically given an opportunity to show how pre-filing testimony by the filing deadline substantially prejudiced their interests. No

such showing was made. Moreover, pre-filed testimony was filed on time and parties fully participated in the hearing.

The procedure for notice and hearing and the deadline for final administrative action are established by statute. The 1985 legislature directed the Board to initiate a water reservation proceeding in the upper Missouri River basin above Ft. Peck Dam. Mont. Code Ann. § 85-2-331(1991). Applications for reservations had to be filed by July 1, 1989, an EIS prepared, and a final Board decision made by July 1, 1992. The alternative to the procedure established by the Board, as promoted by some objectors, would result in the Board violating its statutory mandate and possibly jeopardizing the interests of the water reservation applicants.

When the need to meet the statutory deadlines and the fair and consistent manner in which the hearings process was conducted is balanced against the nature of the interests claimed to be adversely affected, the lack of prejudice shown, and the full participation of the parties, violation of procedural due process cannot be found. The nature of the objectors interests affected does not outweigh the good accomplished by adhering to the established hearing schedule.

The parties had reasonable notice and opportunity to be heard in a meaningful time and in a meaningful manner. The Board concludes that the hearing process did not violate any party's right to procedural due process.

b. Adequacy of EIS

Questions as to the adequacy of the Environmental Impact Statement (EIS) have been raised because the EIS does not discuss a storage alternative. (Brief of Various Objectors (Hanson and Bloomquist, pp. 3-4.) The adequacy of the EIS is associated with the Board's decision-making procedures. It is appropriate to address this issue.

Under MEPA, the DNRC was required to analyze reasonable alternatives to the proposed action. Mont. Code Ann. § 75-1-201(1)(iii)(C)(1991). Because of the large number of applications and the diversity of beneficial uses applied for the EIS analyzes a range of alternative Board actions and related environmental impacts. The alternatives analyzed were the consumptive use, instream, municipal, water quality, combination, and no action. Bd. Exh. Nos. 40 and 41. Storage was not discussed as an alternative.

DNRC did look at the issue of storage in preparing the EIS. A description of existing environment includes a discussion on storage, including, any storage projects that are currently being even considered. Bd. Exh. No. 40, pp. 66-67. The EIS also discusses impacts to possible storage in the future. This discussion is necessarily general since no storage projects are projected for the foreseeable future. Bd. Exh. No. 40, p. 181.

MEPA requires that all reasonable alternatives be

considered.[1] What alternatives must be included in an EIS is governed by a rule of reason. Natural Resource Defense Council v. Morton, 458 F.2d 827 (CA DC, 1972). Remote and speculative alternatives need not be considered. Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council, 435 U.S. 519 (1978); Mandelker, NEPA Law and Litigation, §9:19. Reasonableness in consideration of alternatives is also bounded by some notion of feasibility. Vt. Yankee v. NRDC, 435 U.S. 519, 551.

In response to comments on the Draft EIS concerning storage, the Final EIS explains that DNRC had numerous studies and evaluations on onstream and offstream storage project in the Missouri River's headwaters done throughout the past fifty years. Bd. Exh. No. 41, p. 71. "For example, because of low flow conditions in the Big Hole drainage, DNRC evaluated 120 potential storage sites during the 1970s. Twenty-two of these were studied in more detail between 1978 and 1982, and none were considered economically or financially feasible." Id. All studies reviewed concerning the issue of storage, including the Water Storage component of the State Water Plan, were included by reference in the EIS. Although the benefits of storage were referred to many times in the comments to the Draft EIS and the contested case hearing, no other foreseeable site-specific storage projects were identified. Objectors raising this issue do not cite to any

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[1]Federal case law is an appropriate guide in interpreting MEPA. Kadillak v. Anaconda Co., 184 Mont. 127 (1979).

evidence on storage as an alternative that is sufficient to make reasonable minds inquire further. Vt. Yankee v. NRDC, at 554.

No reservation applicants proposed to supply water to maintain instream flows through storage. Therefore, the EIS would have to speculate on storage sites and the costs of developing them to maintain instream flows. Bd. Exh. No. 41, p. 53. The effects of storage as a possible alternative on each individual stream reach cannot be reasonably ascertained. Montana Wilderness Assoc. v. DNRC, 200 Mont. 11, 24 (1982). "A site-specific analysis would be necessary to determine whether it would be feasible to build storage projects to satisfy instream flows." Bd. Exh. No. 41, p. 71. Undertaking this monumental effort would have been unreasonable given the of information showing that the possibility of implementation is remote and speculative. MWA v. DNRC, at 24. Storage was not a reasonable alternative that needed to be considered in the EIS.

The EIS contains a sufficiently detailed discussion on irreversible and irretrievable commitment of water resources. (See, Brief of Various Objectors (Hanson and Bloomquist), pp. 4-5.) Specifically, the EIS analyzes the impacts of future water development, including storage, if instream flows were granted. It also discusses the current constraint on development if existing water right claims are adjudicated as filed. The EIS is comprehensive and well-documented. It provides the Board with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to grant the water reservation

requests. MWA v. DNRC, at 24.

The Board is aware of the impact of its decision on future development of water in the basin, including storage. The Board's decision does not preclude development of storage. The Board left open the option of storage if it is a viable consideration. The record establishes that there is a potential for storage at certain places in the basin and at certain times of the year. Simply because storage has potential, does not, as discussed, require that the EIS deal with it in depth. For the purposes of the reservation process, without site specific storage proposals, the EIS prepared by the DNRC adequately addressed the issue.

c. Substantive Due Process

Certain objectors also assert that the water reservations statute violates their substantive due process rights by being duplicative, unworkable and creating unfair priority rules. (See, Brief in Support of Motion to Dismiss on Due Process Grounds, Upper Big Hole Objectors, pp. 5-9.) The issues raised concern only the applications of the Department of Fish, Wildlife and Parks (DFWP), Bureau of Land Management (BLM), and Department of Health and Environmental Sciences (DHES).

Constitutional guarantees protect a person's property from unfair government interference. Mont. Const., Art. I, § 17. Due process demands "that the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a

real and substantial relation to the objects sought to be obtained." Montana Milk Control Board v. Rehberg, 141 Mont. 149, 155 (1962). The legislation must be fair and reasonable in content as well as application.

Some objectors argue that the water reservation proceedings are duplicative of other required water right processes, specifically the adjudication currently being conducted by the Water Court. They assert that the cases before the Water Court and the present case before the Board are identical so the reservations statute creates duplicative and unfair burdens on existing water right holders and is, therefore, arbitrary and capricious. (Brief in Support, at 5-7.)

Prior to 1973, there was no advanced state approval or requirement to file an order to perfect a right to use water. The 1972 Constitution "recognized and confirmed" these existing rights. Mont. Const., Art. IX § 3(1). The Constitution also directed the legislature "to provide for the administration, control, and regulation of water rights" and to provide for a centralized system of records. Mont. Const., Art IX Section 3 (4).

To accomplish this Constitutional directive, the legislature passed the comprehensive Water Use Act of 1973. The Water Use Act provides for the adjudication of all existing water rights (pre July 1, 1973), § 85-2-201 through 243, and set out a permit system to apply for a water right after July 1, 1973, § 85-2-301 through 315. The Water Use Act also created a water reservation

system that allows public entities to reserve water for existing or future beneficial uses or to maintain a minimum flow level or quantity of water. Mont. Codes Ann. § 85-2-316(1)(1991).

Montana follows the Prior Appropriation Doctrine. The basic principles of the doctrine are first in time is first in right and beneficial use. The Water Use Act has not changed the basic premise of the Prior Appropriation Doctrine which has always governed water right allocation and use in Montana. The Water Use Act does provide for administration, control and regulation of allocation and use of water rights. Mont. Codes Ann. § 85-2-101(2)(1991). Requiring appropriators to have pre-1973 rights adjudicated and post-1973 rights to go through administrative review for a permit or reservation does not violate due process. See, McDonald v. State, 220 Mont. 519 (1986).

The Water Use Act does require or allow for existing water rights holders to participate in different forums on water use issues. There are, however, reasonable and substantial reasons to require or allow participation to accomplish the Constitutionally mandated purpose of administration, control and regulation of water rights in Montana. Because the state of Montana owns the water for use of its people, the state has a great interest in these purposes. Requiring the adjudication of existing water rights and separately requiring the approval of new water rights is a reasonable means to accomplish the

administration, control and regulation of Montana's water

resources.

Certain objectors state that the adjudication process and the water reservation process deal with essentially the same issues and are duplicative. However, they are very different. Under the general adjudication proceedings conducted by the Water Court, a pre-1973 water right claimant must establish proof of the nature and extent of his or her appropriation. Mont. Code Ann. § 85-2-224(1991). Participation is mandatory. Mont. Code Ann. § 85-2-226(1991). In the Matter of the Adjudication, ____ Mont. ____, Case No. 91-140 (1992). The priority date, amount, and other particulars of a water right claim can be altered by the Court if such a showing of historic beneficial use is not made. Existing water right holders are antagonists in the adjudication process which settles relative priorities. See, McNinch v. Crawford, 30 Mont. 297, 299 (1904).

By contrast, the Water Use Act establishes an exclusive means to obtain a new water right including water reservations. 79 Ranch, Inc. v. Pitsch, 204 Mont. 426 (1983). New water uses are subject to all existing senior rights. Existing water right holders are entitled to object if they feel their water right may be adversely affected by the new use. Mont. Code Ann. § 85-2-308 (1991). This showing is limited to adverse affect. Id. The reservation process does not determine the validity, nature or extent of senior water rights. The Board has no authority to alter a senior water right or deprive that water right of its priority--this is solely the jurisdiction of the Water Court.

Mont. Code Ann. § 82-2-316(14)(1991); ARM 36-16-107B(7). The Board only has the authority to establish a new water right subject to senior water right holders.

The Water Use Act was designed to allow a showing of adverse affect prior to development instead of relying on court proceedings after development and after harm had been suffered. Allowing water right holders the opportunity to object to new permits and water reservations does not violate due process--on the contrary, it was designed to ensure it.[2]

Mont. Code Ann. § 85-2-316 mandates the Board to proceed with a water reservation process on the Upper Missouri River Basin and make a decision by July 1, 1992. Objectors argue that the statute is unconstitutional because it is unworkable until the adjudication is complete. The Board does not have the power to declare statutes unconstitutional. This Board is obligated to carry out the directives of the law.

The adjudication process is continuing and is not anticipated to be completed for at least 15 years. Bd. Exh. No. 41, p. 45. To deny any new appropriative right to water until the adjudication is complete would be unreasonable, unnecessary, and contrary to the policies of Montana for maximum utilization

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[2]The case cited by objectors, St. Johns Irrig. and Ditch Co. v. Arizona Water Commission, 621 P.2d 37 (Ariz. App. 1980) is not applicable. In that case, appropriators were faced with repeated applications for consumptive uses that would adversely affect their water rights and had no other remedies available. In this matter, the applications that these parties object to will not consume water and future diversions can be precluded by closing the basin. Mont. Code Ann. § 85-2-319.

of its water. Mont. Code Ann. § 85-2-101(3)(1991).

Postponing a decision on water reservation applications until the completion of the adjudication would not address the objectors concerns. Final decrees from the Water Court will establish water right priorities and an upper limit of historical use. Not all appropriators take water at the same time, not all use their water to the maximum extent of their right at all times, and return flows are available for downstream use. Physical water flow records are reliable evidence to show the patterns of use on a particular stream. The Water Court decrees will recognize and confirm the existing rights that reservants must respect.

Certain objectors also assert that the reservation statute gives priority to water reservations unfairly. The water reservation statute gives the reservant a July 1, 1985 priority date if the application for water reservation was submitted by July 1, 1989. Some objectors apparently are arguing that the priority date should be 1989. The statute clearly states the Legislature's intention that reservations have a July 1, 1985 priority date.

Water law in Montana has always provided for "relation back," that is, if the appropriator exercises reasonable diligence in completing his appropriation works and puts the water to beneficial use then the priority date of the water right will relate back to the date of commencement. Bailey v.

Tintinger, 45 Mont. 154, 171 (1911). Statutes later required a filing in order for the priority date to relate back to the date of filing. Id. Otherwise the priority date would be the date of actual beneficial use. The Water Use Act now provides that the priority date will be the date of filing an application if actual beneficial use is made within the time period established under the permit. Mont. Code Ann. § 85-2-302 (1991). Because the priority of appropriation is very valuable, as pointed out by objectors, it is important to protect the right against intervening users prior to perfecting the water right.

The Legislature established a July 1, 1985 priority date to act as an incentive for reservants to participate in one unified proceeding (instead of 39 separate proceedings). A water reservation application is also very detailed compared to a permit application. There appears good justification to allow the priority date to relate back to 1985 so that the applicants had time to prepare their applications as part of the unified proceeding.

There is no indication that any of the Objectors include water rights holders between 1985 and 1989. This motion lacks merit and movants have no standing to raise it.

The Board concludes that the hearing process did not violate any party's right to substantive due process.

1. Equal Protection

Certain objectors assert that the instream applications should be dismissed on equal protection ground. They argue that private appropriators may want to build storage in the future, but are prohibited from applying for a water reservation. (Brief in Support of Motion to Dismiss on Due Process Grounds, Upper Big Hole Objectors, p. 8.) Only State or Federal agencies or subdivisions of the State may apply for a water reservation. Mont. Code Ann. § 85-2-316(1)(1991).

The Fourteenth Amendment to the United States Constitution and Article II, Section 4 of the Montana Constitution of 1972 provide that no person shall be denied the equal protection of the laws. Legislation that does not involve suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose. Intake Water Company v. Yellowstone River Compact Commission, 590 F. Supp. 293, 298, cert. denied, 459 U.S. 969 (1982). Such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality. Id.

Even assuming that objectors could make a showing that they have an interest in a future appropriation beyond a mere expectation and that the classes are similarly situated, the standard for review would be the "rational relation" test. Id.

The water reservation process does not involve suspect

classifications or impinge on fundamental rights. "A suspect class is one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" Matter of C.H., 210 Mont. 184, 198 (1984)(quoting, San Antonio School District v. Rodriguez, 411 U.S. 1, 28 (1973)). Appropriators of water in Montana are not saddled with disabilities, have not suffered a history of purposeful unequal treatment, and are not in a position of political powerlessness; no suspect class is involved.

The nature of the individual interest affected by the water reservation statute (anticipation of applying for a future water appropriation) is not a fundamental right. Matter of C.H., at 198. Review of a statute for equal protection violations requires a inquiry into the nature of the interest affected, the extent of the affect, the rationality of the connection between the legislative purpose and the means used to carry out the purpose, and alternatives for effectuating the purpose. Id.

The interest affected in appropriating water is considered economic, and the right to pursue a particular "calling," such as agriculture, is not a fundamental right. Country Classic Dairies v. Milk Control Bureau, 847 F.2d 593, 596 (9th Cir. 1988). The extent of the affect of water reservations will also be economic by possibly limiting or precluding future water uses.

The water reservation bears a rational relationship to a

legitimate state purpose. The objectors seek dismissal of only the instream flow applications. Instream flow applications were filed by agencies statutorily vested with responsibilities regarding protection of fish, wildlife, recreation and public health. These are legitimate resource interests of the State. The water reservation statute was created, in part, to provide a means for recognizing and protecting these resource values. Other legislative alternatives to protect instream resource values through the appropriation of water, such as issuance of permits or sale of water rights would have the same impact on future appropriators.

Objectors have not met their heavy burden to show that the water reservation statute is not rationally related to a legitimate governmental purpose. The Board concludes that the hearing process did not violate any party's right to equal protection.

3. 50% Limitation on Gauged Streams

Intervenor Montana Council of Trout Unlimited and the Montana Chapter of American Fisheries Society (MTU/AFS) argue that the limiting instream water reservations to 50% of the average annual flow is unconstitutional and arbitrary. (MTU/AFS Brief, at 7-8). MTU/AFS asserts that the Montana Constitution guarantees a clean and health environment and the 50% limitation violates this constitutional provision. They also assert that no studies concerning its effects were done prior to passage of the

limitation and that it prevents DHES from carrying out its constitutional and statutory duties of protecting public health.

The Board appreciates the fact that the Hearing Examiner provided an analysis of the issues involving this constitutional challenge. The Board also is cognizant of why the Intervenor has raised this issue. This Board, however, does not have the power to declare statutes unconstitutional. The Board is required to follow the statutory dictates in reaching its decision on reservations. The law, Mont. Code Ann. § 85-2-316(6)(1991) set the 50% limitation and this Board may not disregard it.

4. Baker Ditch

Several objectors contend that recent language from the Montana Supreme Court prohibits any granting of instream flows except by the Water Court. (See, Brief in Support of Motion to Dismiss for Lack of Jurisdiction, Upper Big Hole Objectors, pp. 1-3.) Baker Ditch Co. v. District Court, ____ Mont. ____, 49 St. Rep. 17 (1992), considered instream flows that for practical purposes were given a priority date earlier than an existing, pre-1973 water right. No such instream flow is at issue here. To the extent that this opinion may be read as prohibiting the reservation process from continuing despite clear legislative direction, the Board considers that part of the decision only dicta.

5. The Applications are Timely

Some objectors assert that there is no legal basis upon which to grant a reservation because ARM 36.16.117 provides that the determination on reservation applications must be made before December 31, 1991. (Brief of Mill Creek and Wisconsin Creek Objectors, p. 4.)

The water reservation statute was amended in the 1989 legislature to change the date for the final administrative decision on the upper Missouri River basin water reservation applications from December 31, 1991 to July 1, 1992. (Chap. 134, 1989 Sess. Laws.) Notice of Proposed Rule Change was issued on July 15, 1991 to update the administrative rules governing the water reservations to reflect this statutory change. MAR, No. 14, July 25, 1991. The Board adopted the Proposed Rule Change on September 30, 1991 and ARM 36.16.117 was changed to July 1, 1992. MAR, No. 19, October 17, 1991. The Board continues to have authority to act on water reservations.

6. Transportation of Water Out of the State.

Objectors raise an argument that granting instream flows would leave water in the rivers that would eventually flow out of the state. Therefore, they argue that the applications are the instream flow applicants are "reserving water for transport outside of the State of Montana" and are subject to the more stringent requirements for granting a reservation for that purpose. (Brief of Mill creek and Wisconsin Creek Objectors, pp.

4-5.) Mont. Code Ann. § 85-2-316(4)(b)(1991).

The water reservations statute authorized public entities to apply for beneficial uses of water within the state. Out of state transport of water may also be reserved, however, the applicant must show by clear and convincing evidence that the criteria in ARM 36.16.107B(5) have been met. All instream flow applicants have applied for use of water on reaches and points located wholly within the State of Montana. The instream beneficial uses of water will occur entirely within the State. The fact that such use within the State incidentally benefits another state does not bring the application under the auspices of ARM 36.16.107B(5). Wise utilization of water within Montana is authorized by the legislature to include uses accomplished by leaving the water instream.

7. Adverse Affect

Numerous objectors, both full parties and limited parties, have objected to the instream flow applications on the basis that instream flow reservations would adversely affect their existing water rights. (E.g., Memorandum, Lower Big Hole Objectors (Gilbert), pp. 11-13.) Claims of adverse affect fall into four general categories. Instream flows would prevent the exercise of their water rights. Instream flows would prevent future changes in their water rights. Instream flow reservants would gain standing to object in the adjudication process. And finally, instream flow reservations would alter existing administration of

water rights by requiring appointment of water commissioners and installation of measuring devices.

Under the Prior Appropriation Doctrine, first in time is first in right. The first person to use water from a source establishes the first right, the second person is free to divert flows from what is left, and so on. During a dry year the person with the earliest priority date has the right to use water senior to that of subsequent appropriators. Since instream flow reservations have a July 1, 1985 priority date, they are subject to and cannot interfere with the exercise of a valid water right with a senior priority date. These senior water rights include the right to store water and all water rights attendant to such storage. All objectors herein claim a senior (usually very senior) water right and will not be adversely affected by granting instream flow reservations.

Objectors also imply that they would be adversely affected by adding an additional user to a "fully appropriated" stream. Legal water availability is not a criteria for granting a water reservation. Mont. Code Ann. § 85-2-316(4)(1991). However, senior water rights cannot be adversely affected. ARM 36.16.107B(7).

The water reservation statute specifically authorizes applications for instream flow water rights. Mont. Code Ann. § 85-2-316(1)(1991). Purposes served by instream flow reservations such as fish, wildlife, recreation, and water quality are recognized beneficial uses of water in Montana. ARM

36.16.102(3). The instream flow requests are for streams that have not been closed to new appropriations. Mont. Code Ann. § 85-2-319 (1991).

A prior appropriator cannot prevent subsequent appropriations if he can continue to reasonably exercise his water right. Mont. Code Ann. § 85-2-401(1)(1991). Instream flows do not require a diversion, impoundment, or withdrawal in order to prefect a water right. Instream flows will not consumptively use water, so prior existing rights will have no need to shut down a junior diversion by putting a "call" on the water in order to exercise their right.

An extension of Objectors' over-appropriation argument is that instream flow reservants cannot beneficially use water that is not there. Applicants have shown water is physically available for use. ARM 36.16.105(B)(2). Physical water availability is only used to demonstrate that a flow exists in the stream for beneficial use. Of course, the amount of flow will vary from year to year (and even from day to day) based on climatic changes and the uses of senior appropriators. Applicants have shown that historically, in most years, water is physically present in the amount requested for at least part of the year. For ungauged streams flows were estimated by the U.S. Geological Survey and evidence of fish populations were presented. There is substantial evidence that flows exist and instream flow reservants have a right to apply to use that water when senior water right holders are not using it. Cook v.

Hudson, 110 Mont. 263, 283 (1940).

Many objectors claim that instream flows would adversely affect their water rights by preventing future changes of those rights. The corollary of the Prior Appropriation principle of first in time is first in right, is that subsequent appropriators are entitled to maintenance of the condition of the stream existing at the time they make their appropriations. Quigley v. McIntosh, 110 Mont. 495, 505 (1940). Changes in use of a senior water right can only be made if others if subsequent appropriators are not thereby injured. Id. Cases dating as far back as the 1800s, show that subsequent appropriators can prevent changes to senior appropriations if their water rights would be adversely affected. Gassert v. Noyes, 18 Mont. 216, 223 (1896). This guiding principle is now contained in Mont. Code Ann. § 85-2-402(2)(a)(1991). For authorization to change an appropriation right, the appropriator must prove by substantial credible evidence that:

> The proposed use will not adversely affect the water rights of other persons or planned uses or development for which a permit has been issued or for which *water has been reserved*.

Mont. Code Ann. § 85-2-402(2)(a)(1991)(emphasis added).

The Montana Constitution recognizes and confirms existing rights. Mont. Const. Art. IX § 3(1). The basis measure and limit of an existing right is historic beneficial use. McDonald v. State, 220 Mont. 519, 530 (1986). The Water Use Act codified what has always been the law in Montana governing water rights. Neither the water reservation statute nor the change

authorization statute destroys the right to use water in the manner that it has been historically beneficially used. See, Castillo v. Kunneman, 197 Mont 190, 199 (1982). Senior appropriators have never been entitled to keep others from appropriating water as long as they could reasonably exercise their right, and senior water right holders have never been entitled to changes in their appropriation if subsequent appropriators were adversely affected. That new water right appropriators may restrict the ability to change water rights in the future is not and has never been an "adverse affect" recognized by law.

Objectors argue that granting a reservation would give instream reservants standing to object in the adjudication process. The water rights adjudication statute allows all water right holders and interested persons on a stream to receive notice of the temporary preliminary decree and preliminary decree and provides an opportunity to object, including water reservation holders. Mont. Code Ann. § 85-2-232(1)(1991). Junior appropriators have a material interest in having water rights accurately decreed. McDonald, 200 Mont. 519, 530. Granting reservations, and the rights that follow from that decision, is not "adverse affect" as recognized by law. It should be noted, however, that DFWP already claims standing and has participated in the adjudication process. Bd. Exh. No. 41, p. 47.

Finally, objectors point out that instream flow reservants

could change present administration of streams by requesting water commissioners and requiring measuring devices. Water commissioners are used to distribute water according to rights and priorities on streams governed by an enforceable decree. Mont. Code Ann. § 85-5-101(1) and (2)(1991); Bd. Exh. No. 41, p. 49 (describes limitations on appointment by instream flow reservants. Until such time as a stream is adjudicated, reservants do not have an independent method if seeking the appointment of water commissioners.).

"The appointment of a water commissioner to distribute the waters is a method devised to carry the decree into effect." State ex rel. Swanson v. District Court, 107 Mont. 203, 207 (1938). The expense of employing a water commissioner does not constitute an adverse affect recognized by law. McIntosh v. Graveley, 159, Mont. 72, 82 (1972). Similarly, instream flow reservants cannot require measuring devices. The District Court has discretion to require measuring devices if necessary to aid in the administration of water rights on a stream. Id., at 81-82.

8. Legal Water Availability

Many objectors contend that their earlier rights mean that water is not legally available on the stream and this forecloses the allowance of a reservation for consumptive uses or instream uses. (See, Brief, East Bench Irrig. Dist., pp. 14-15.) Water right claims are not accorded *prima facie* status in the water

reservation proceedings. (ORDER, Jan. 2, 1992.) However, evidence of existing uses was presented at the hearing and considered. This evidence consisted of decrees as well as claims.

One of the primary responsibilities in these proceedings is to determine whether or not the reservations would adversely impact existing rights. The criteria for reservations are distinct from those administered by the Department of Natural Resources and Conservation in the permitting process. Specifically, the permitting process requires an affirmative finding by the Department that there are waters available for appropriation in the source of supply. Mont. Code Ann. § 85-2-311(1)(a)(1991). This may be accomplished in certain cases by referring legal questions concerning existing claims to the Water Court. Mont. Code Ann. § 85-2-309(2)(1991). No such requirement or certification process exists in the legislation concerning water reservations. Mont. Code Ann. § 82-2-316(4)(1991); Mont. Code Ann. § 82-2-309(2)3)(1991).

The requirement for no adverse affect on existing rights is protected by the relative priorities of the existing rights and the reservation rights. In certain cases, particularly on the Teton River, water right holders have made a showing that their water rights would be affected due to water quality concerns. Water quality is an adverse impact that at the present is not adequately protected by priority date. For those reasons and in that situation it was found that the objectors rights would be

adversely affected by the reservation and the reservation was denied.

9. Conditions To Limit Objections To Change

Numerous objectors have suggested that instream flow reservations be conditioned to prevent reservants from objecting to changes of appropriation rights. The Board has the power to reasonably condition water reservations to prevent adverse affect of prior appropriators, and to aid in the administration, control, and regulation of reservations. However, this power does not extend to issuing reservations which cannot be protected or enforced. A water right holder may not make a change of appropriative right which will adversely affect a water reservation. Mont. Codes Ann. § 82-4-402(1991).

10. Need For Instream Flows

Many objectors assert that instream flows are presently fully protected by downstream hydropower rights. (E.g., Brief of Teton Users Association, pp. 2-6.)

The Bureau of Reclamation and the Montana Power Company have filed very large water right claims for water storage and hydropower generation in Montana. Bd. Exh. No. 40, pp. 57-59. Although water right claims are not *prima facie* evidence in this proceeding and the Board makes no determination concerning the nature or extent of the existing water rights, it can safely be said for arguments sake, that the Bureau of Reclamation and the

Montana Power Company have substantial water rights to Missouri River water. To the extent that these hydropower rights may be adjudicated as claimed, they may call for greater flows than the instream reservation requests. The issue presented by objectors is whether the instream flow reservations are needed if hydrogeneration protects the status quo of stream flows.

Instream water reservations would use the same water that is claimed by hydropower producers. These uses are concurrent. The purposes of water use by hydropower producers and instream flow reservants are different. Hydropower producers are not required to exercise their right for the benefit of other instream resource values, nor can they be compelled to continue to exercise their rights. Furthermore, changes or new developments, such as small scale hydropower, could have significant localized impact without adversely affecting hydropower rights. The water reservation applicants have demonstrated that there are water resource values that warrant reserving water for specific authorized purposes, the reservations are needed. ARM 36.16.107B(2)(b). Because, however, as a practical matter the water is the same, the Board determined to grant instream flow reservations concurrent with other non-consumptive rights.

The instream flow reservants can exercise all their rights associated with the reservation independently of the concurrent non-consumptive right holders. The water right adjudication will at some point establish the nature and extent of the hydropower and storage rights. If that determination results in those right

being less than claimed, the Board under its review authority, can modify the concurrent status of the instream flow reservations it has granted.

11. Water Quality

Water quality issues are beginning to gain attention. The past two decades have been a time of rapidly changing laws and standards in the water quality area. Montana faces the challenge of how to integrate water quality concerns with existing law and existing rights concerning water use and allocation. In future years additional information will be gathered, laws refined, and hopefully innovative approaches developed to deal with this integration. Many Conservation Districts projects have been granted a water reservation conditioned on meeting water quality laws at the time of development. The public interest criteria allows this process to move forward, while addressing the water quality issue at the time of development. This does not make the Conservation District reservation speculative; but demonstrates the need for flexibility as conditions change.

CONCLUSION

There has been much discussion about the affect of granting reservations on senior water right holders. As set forth previously, the legal doctrine of prior appropriation developed to include the acceptance of junior water right holders. Junior

water right holders are entitled to the maintenance of stream conditions at the time of their appropriation. Statute now incorporates this principle. Reservations for instream use cannot be denied solely because they with have an impact on senior water rights.

The Board firmly believes that the granting of instream reservations will have an impact on senior water right holders and are indirect costs of the reservations. It is naive to think that granting an interest in a scarce resource when there are already competing interests won't have an impact. The fact is that junior water right holders, whether reservations or some other type, do have an impact on senior water right holders. This impact varies with the particularities of individual situations. To deny the impact in general is to ignore real life experiences.

The concerns of the objectors are real. The Legislature has chosen to incorporate the reservation process into the existing system of water rights and the adjudication of those rights. The Board recognized the Legislature's prerogative in doing this. The Board accepts that the Legislature is presumed to have considered in full all the possible ramifications of its decision. In authorizing the process for reservations on the Missouri River basin, the Legislature has by implication weighed the concerns of the objectors. In carrying out its responsibilities to conduct the reservation process, the Board can only deal with the facts as presented within the guidelines

of the law.

Based on the facts before it, the Board finds the concerns of the objectors are valid. The Board cannot change the law it has recited. It can only work within that system. In reaching its decision on granting the reservations, the Board has used the law as it exist today to address the objectors' concerns.

The objectors are not powerless in the face of the reservations the Board has granted. If there is no water available as the objectors argue, they have the power to deal with the instream flow reservations. If water is available, the reservations stand to fulfill the purposes the Legislature intended.